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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES R. MAZZULLO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Coast Guard acted reasonably in response to reports that a boat operated by petitioners' decedents was in distress.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-18a) also is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on December 18, 1980. A petition for rehearing was denied on January 14, 1981 (Pet. App. 21a). The petition for a writ of certiorari was filed on April 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 19, 1973, the SEA BOY II, a 53-foot cabin cruiser, left Freeport for Nassau in the Bahama Islands with eight persons on board (Pet. App. 3a, 5a). Shortly after 8:00 p.m. on December 20, 1973, a Yugoslavian tanker, the SILBA, "received two garbled MAYDAY radio calls from

a vessel identifying itself as the Sea Boy" (*id.* at 6a). The SILBA interpreted the calls as stating: " 'MAYDAY. Sea Boy 2 Two Miles East of Whale Cay.' " The SILBA's repeated attempts to establish two-way communications with the SEA BOY were unsuccessful (*ibid.*).

The SILBA relayed the SEA BOY's MAYDAY message to all ships and stations on 500 KHZ, a Morse Code frequency. At 8:17 p.m. the Coast Guard's Rescue Coordination Center (RCC) for the Seventh Coast Guard District at Miami, Florida, received a call from the Coast Guard Radio Station in Miami (Radsta). Radsta informed RCC that it had received a MAYDAY message and asked for the location of Whale Cay. RCC told Radsta that there were two Whale Cays and asked Radsta " 'what's identification and problem?' " (Pet. App. 6a). Radsta replied that it did not know the nature of the problem and that it was unable to establish communications with the SILBA (*id.* at 6a-7a).

Radsta and another communications station attempted unsuccessfully for more than an hour to communicate with the SILBA. Although the SILBA continued to send the SEA BOY's MAYDAY distress message, it never altered its course to proceed to the distress location. During the attempts to communicate with the SILBA, Radsta notified RCC that the SILBA was relaying a MAYDAY message for " 'vessel Seabouy 2 [*sic*] who is in distress 2 miles east of Whale Cay' "and that Radsta could not establish communications with the SILBA (Pet. App. 7a).

At 8:54 p.m. RCC attempted to call the Bahamian Air and Sea Rescue Association (BASRA), and at 9:12 p.m. it briefed BASRA on the events described above. BASRA replied that it had no information about the SEA BOY but that it would try to contact the vessel. At 10:15 p.m. BASRA informed RCC that its efforts had been unsuccessful (Pet. App. 7a).

RCC also contacted the Federal Communications Commission to obtain information about the SEA BOY. The FCC gave RCC the names of two previous registered owners of the SEA BOY, but RCC received no relevant information from them (Pet. App. 7a).

At 9:25 p.m. that same day, RCC decided not to launch any vessels or aircraft to search for the SEA BOY until the next morning because of weather problems. Further communication difficulties and confusion developed at about 10:30 p.m., when a British merchant vessel, the CORNISH WASA, began to relay SILBA's transmissions, which were merely relays of SEA BOY's original distress messages. The CORNISH WASA also was unable to establish communications with the SEA BOY. At 10:37 p.m., after being informed that the CORNISH WASA was in an electrical storm, RCC requested the CORNISH WASA to stand by for communication. At 11:49 p.m., RCC noted that the CORNISH WASA did not know the nature of the SEA BOY's distress and was not proceeding to the reported location. Although RCC was informed of the locations of the SILBA and the CORNISH WASA, it continued to have difficulties communicating with both vessels (Pet. App. 8a).

At 11:57 p.m. the Coast Guard released the CORNISH WASA from communications standby, and at 12:22 a.m. it released the SILBA (Pet. App. 8a-9a). At 1:00 a.m. RCC notified the Commander of the Atlantic Area that it did not plan any action until the morning "[a]fter the weather clears" (*id.* at 9a).[1]

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[1] At 4:00 a.m. that same morning the Coast Guard received a MAYDAY call from another vessel. The Coast Guard was able to establish direct communications with this vessel and, after determining its position and distress situation, dispatched a helicopter and aircraft to aid the vessel (Pet. App. 9a).

The next morning, December 21, the Coast Guard sent an aircraft to search the two Whale Cays for the SEA BOY. The search of the cays was completed by 10:00 a.m. without success. RCC briefed BASRA on the situation and the search then was interrupted pending the receipt of additional information. At 7:10 p.m. BASRA notified RCC that the SEA BOY's owner had reported the vessel overdue from Freeport (Pet. App. 9a). The Coast Guard resumed its search and found the remains of the SEA BOY at 11:20 a.m. on December 24. The bodies of the passengers were never recovered (*id.* at 10a).

2. The administrator of the estates of the eight decedents brought suit for damages from the United States, alleging negligent acts or omissions in the rescue operations (Pet. App. 1a).[2] Following a bench trial in the United States District Court for the District of Columbia, the court concluded that the plaintiffs had failed to demonstrate the existence of a legal duty on the part of the Coast Guard to aid the SEA BOY (*id.* at 10a-16a). The court pointed out that the Coast Guard had no duty to undertake rescue efforts and never "took charge" of the SEA BOY search (*id.* at 11a-15a). It further stated that "[t]he record reveals initial confusion and uncertainty by all participants in the SEA BOY search, as a result of the meager information in hand and the difficulty of sustained communication" and that, under these circumstances, it could not "fault the judgment of those on duty * * *" (*id.* at 15a). The court specifically

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[2]The complaint originally also sought damages from the owner of the vessel for permitting navigation of an unseaworthy vessel and from the manufacturer of the SEA BOY for negligent design of the vessel. In addition, the owner filed a complaint for exoneration from, or limitation of, liability, pursuant to 46 U.S.C. 181 *et seq.* The cases were consolidated in the United States District Court for the District of Columbia (Pet. App. 1a). Prior to trial, the claims against the manufacturer and owner were settled. Only the claim against the United States proceeded to trial (*id.* at 2a).

noted the absence of proof that the Coast Guard's participation had deterred any would-be rescuer from proceeding in a timely fashion to the SEA BOY, particularly in light of the fact that neither the SILBA nor the CORNISH WASA ever established direct communication with the SEA BOY or made any effort to change its course to render assistance to the distressed vessel (Pet. App. 15a-16a).

In addition, as an alternative holding, the district court concluded that petitioners had failed to establish proximate cause. The court found that, "[s]imply stated, the loss of the Sea Boy remains shrouded in mystery" and that there was a "lack of sufficient direct and circumstantial evidence to relate Sea Boy's demise to any action of the Coast Guard" (Pet. App. 17a).

The court of appeals affirmed in a memorandum opinion (Pet. App. 1a-2a). The court found it unnecessary to reach the question whether the "Coast Guard had a legal duty * * * to do all things reasonably required to make a meaningful attempt to rescue [those on board the SEA BOY]" (*id.* at 2a). Rather, it concluded that "[t]he fact findings made by the District Court preclude a judgment that the Coast Guard's handling of the matter was irresponsible or outside the bounds of the considerable discretion it assuredly must have to determine its course of conduct when information is meager and conditions shifting and uncertain" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this fact-bound decision accordingly is not warranted.

1. The court of appeals, without reaching the question whether the Coast Guard had a legal duty "to do all things reasonably required to make a meaningful attempt to

rescue" a distressed vessel, concluded that the Coast Guard had acted reasonably in the circumstances of this case (Pet. App. 2a). As the district court found (*id.* at 15a):

> The record reveals initial confusion and uncertainty by all participants in the Sea Boy search, as a result of the meager information in hand and the difficulty of sustained communications. Instead of sending rescue forces out blindly to an unknown situation, RCC * * * determined to gain additional information, hopefully to clarify the nature of the distress and in the end to facilitate the search.
>
> Perhaps, in hindsight, some Coast Guard personnel other than those on duty on the night of December 20th might have taken other steps and launched an immediate sea-air rescue mission. But, we are dealing with discretion and judgment and we cannot in the circumstances of this case fault the judgment of those on duty to the point of declaring a violation of the legal responsibility on the part of the Coast Guard to the decedents.
>
> Finally, the plaintiffs have failed to prove to the Court's satisfaction that the Coast Guard's participation in this incident dissuaded any would-be rescuer from proceeding, timely, to the Sea Boy.

The court of appeals' conclusion that the Coast Guard acted reasonably, based on the district court's findings of fact, is plainly warranted.

2. Petitioner asserts (Pet. 7) that further review is necessary in order to determine "what standard of duty * * * Congress intend[ed] to impose" on the Coast Guard under

14 U.S.C. 88.[3] In holding that the Coast Guard acted reasonably, however, the court of appeals did not deem it necessary to reach that issue. Hence, the court must have assumed that the Coast Guard was required to meet the standard of duty urged by petitioners. In these circumstances, there is no reason for this Court to address the legal

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[3] 14 U.S.C. 88 provides:

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes;

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.

duty issue, because a resolution of the question could not benefit petitioners.[4]

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[4]In any event, contrary to petitioners' assertion (Pet. 7, 9-10), there is no conflict among the circuits concerning the standard of duty imposed on the Coast Guard by 14 U.S.C. 88. As the district court noted (Pet. App. 11a), "[o]ther courts in different settings have recognized the permissive quality of the statutory language * * * and accordingly have ruled that there is no pre-existing legal duty on the Coast Guard to provide rescue services on demand." *United States* v. *Gavagan*, 280 F. 2d 319 (5th Cir. 1960), cert. denied, 364 U.S. 933 (1961), on which petitioners primarily rely, involved a "death resulting from *the manner in which the Government undertook* the unsuccessful rescue of the shrimper Donald Ray and her crew off the Florida Coast" (*id.* at 321; emphasis added). In contrast to the facts of the present case, the vessel in *Gavagan* had been sighted, but was lost as a result of an erroneous Coast Guard communication that deterred a commercial tanker located within five miles of the distressed vessel from coming to the latter's aid. *Id.* at 324. Indeed, in a subsequent case the Fifth Circuit described its decision in *Gavagan* as follows (*United States* v. *DeVane*, 306 F. 2d 182, 186 (5th Cir. 1962)):

> *Gavagan* went no further than affirming what is clear from the statutes—that the decision to undertake or abandon a rescue is discretionary with the Coast Guard * * *. But having undertaken the rescue and engendered reliance thereon, the obligation arose to use reasonable care in carrying out the rescue. And negligence in the operation would create liability if it was the proximate cause of loss or damage where the position of one was worsened in reliance on the undertaking by the Coast Guard.

Similarly, petitioners' reliance on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), is misplaced. In that case, the government was held liable to a shipowner whose cargo was damaged as a result of the failure of a light in a lighthouse operated by the Coast Guard. The Court expressly noted (*id.* at 69), however, that "[t]he Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light * * * and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order * * *." In contrast, in the present case the Coast Guard did nothing to engender the reliance of petitioners' decedents or of potential rescuers. Indeed, as the district court found (Pet. App. 14a), the Coast Guard's Official Recreational Boating Guide "serves as an explicit reminder to the would be sea-farer that he should not venture blindly into unfamiliar waters, armed with

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the simple faith that the Coast Guard will extricate him from his self-made dilemmas, whenever and wherever those occur."

Finally, there is no merit to petitioners' legal position. As the district court pointed out (Pet. App. 11a), 14 U.S.C. 88 plainly *permits* but does not *require* the Coast Guard to assist persons and vessels in distress. In addition, neither the operational orders and internal guidelines nor the treaty obligations and executive order relied on by petitioners (Pet. 11, 13-14) establish any duty owed by the Coast Guard to third parties. See *United States* v. *Caceres*, 440 U.S. 741 (1979); *Head Money Cases*, 112 U.S. 580, 598 (1884); *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F. 2d 464, 471-472 (D.C. Cir. 1940), aff'd, 311 U.S. 470 (1941).

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